In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 627

GRANT E. HAYES AND RONALD J. McDONALD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioners' convictions on retrial (Pet. 24-30) has not yet been reported. The previous opinion of the Court of Appeals, reversing the convictions after the first trial, is reported at 227 F. 2d 540.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1956, and a petition for rehearing was denied on November 17, 1956. The petition for certiorari was filed December 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting in evidence the original 1950 return of the Grant E. Hayes Company, a corporation, and the amended return subsequently filed in compliance with Section 305 of the Excess Profits Tax Act of 1950.

2. Whether the indictments, which alleged that petitioners had wilfully attempted to evade income taxes by filing false returns, charged offenses under Section 145 (b) of the Internal Revenue Code of 1939.

3. Whether the conduct of the trial judge indicated bias and prejudice against petitioners.

4. Whether the evidence was sufficient to support the verdict.

5. Whether the trial court was required to give a specific instruction, in addition to the usual instruction on reasonable doubt, to the effect that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof,

shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 3616.)

EXCESS PROFITS TAX ACT OF 1950, c. 1199, 64 Stat. 1137:

SEC. 305. FILING OF RETURNS FOR TAXABLE YEARS ENDING AFTER JUNE 30, 1950, AND BEFORE DECEMBER 31, 1950.

In the case of a corporation subject to the tax imposed by subchapter D of chapter 1 of the Internal Revenue Code for a taxable year ending after June 30, 1950, but prior to December 31, 1950, such corporation shall after the date of the enactment of this Act and before March 15, 1951, make a return for such taxable year with respect to the tax imposed by chapter 1 of the Internal Revenue Code for such

taxable year. The return required by this section for such taxable year shall constitute the return for such taxable year for all purposes of the Internal Revenue Code; and no return for such taxable year, with respect to any tax imposed by chapter 1 of such code, filed on or before the date of the enactment of this Act shall be considered for any of such purposes as a return for such year. The taxes imposed by chapter 1 of such code (determined with the amendments made by this Act) for such taxable year shall be paid on March 15, 1951, in lieu of the time prescribed in section 56(a) of such code. All payments with respect to any tax for such taxable year imposed by chapter 1 of such code under the law in effect prior to the enactment of this Act, to the extent that such payments have not been credited or refunded, shall be deemed payments made at the time of the filing of the return required by this section on account of the tax for such taxable year under chapter 1 determined with the amendments made by this Act.

STATEMENT

On January 9, 1954, three four-count indictments were returned in the United States District Court for the District of Utah, charging petitioners individually with wilful attempted evasion of their respective income taxes, and jointly with attempted evasion of the income taxes of the Grant E. Hayes Company, a corporation, for the years 1947 to 1950, inclusive, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 7-14):

GRANT E. HAYES

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947).....	$24,009.73	$ 7,945.65	$34,101.84	$14,108.64
Count II (1948).....	14,527.97	2,545.78	38,951.23	11,408.94
Count III (1949).....	4,839.20	429.81	8,770.73	1,300.91
Count IV (1950).....	15,238.23	2,574.90	52,772.48	18,017.38

RONALD J. McDONALD

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947).....	$ 3,177.11	$ 417.01	$ 4,632.96	$ 721.29
Count II (1948).....	7,150.23	1,041.56	11,106.63	1,874.64
Count III (1949).....	6,321.27	881.27	8,160.97	1,237.24
Count IV (1950).....	7,174.64	1,091.32	8,962.71	1,449.30

GRANT E. HAYES COMPANY

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947).....	$40,542.27	$13,308.63	$53,643.76	$20,384.63
Count II (1948).....	38,412.33	13,219.69	58,501.48	22,230.56
Count III (1949).....	31,787.92	9,904.47	45,590.44	16,662.94
Count IV (1950).....	22,486.15	5,247.57	54,250.50	20,312.10

Petitioners were convicted after a jury trial but the judgments were reversed on appeal because of an erroneous instruction on the effect to be given the evidence as to petitioners' good reputation. *Hayes* v. *United States,* 227 F. 2d 540, 544-545. After retrial petitioners were again found guilty by a jury on the eight counts which applied to them respectively. Hayes was sentenced to concurrent terms of imprisonment for two years and fined $3,750 on each count, while McDonald received the same sentence of imprisonment and was fined $1,875 on each count. Service of imprisonment was suspended as to one count and petitioners were placed on probation for five years, to commence at the termination of the other sentences. (R. 46-53.)

The evidence to support the verdicts may be summarized as follows:

Petitioner Hayes was president and owner of all but two shares of the stock of Grant E. Hayes Company, a corporation which dealt in new and used cars. (R. 60, 167, 177, 179.) Petitioner McDonald was secretary of

the corporation and was in charge of the books and records. (R. 60, 153-154.)

Between December 10, 1946, and February 24, 1947, the Studebaker Corporation sent Grant E. Hayes Company seven volume discount payments, totalling about $8,000, which were not recorded on the Grant E. Hayes Company books. Three of these checks were deposited in Hayes' personal account at the Continental Bank and Trust Company. The remaining checks were deposited in the Grant E. Hayes Company account at the same bank. None of these checks was reported as income either in the company returns or in Hayes' personal return. (R. 62-67, 74, 94, 112, 113, 227-228.) In 1947 the Studebaker Corporation inaugurated a new system of making volume discount payments. Within 90 days after the end of the model year Studebaker Corporation was to send to each dealer one check for the volume discount earned during the entire year, the amount depending upon the number of cars sold. The following schedule shows the amount of the volume discounts thereafter received by the company and deposited in the company bank account, the amount reported on the company returns and the amount unreported (R. 62-67, 106, 107):

Date	Check Number	Received and Deposited	Reported	Unreported
12/29/47	30547	$ 9,053.96	$ 4,798.88	$ 4,255.08
3/29/49	34772	11,285.16	6,818.19	4,466.97
11/16/49	37259	11,351.35	7,696.27	3,655.08
	Totals	$31,690.47	$19,313.34	$12,377.13

Between May 26, 1947, and August 19, 1950, the parts and accessories expense account was charged with eleven checks totalling about $40,000, which were not used for the purchase of parts and accessories. Of the ten check stubs, eight indicated payment to Stude-

baker Corporation, one recorded payment to Western Avenue Motor Equipment Company, and one showed payment to Schramm's Auto Service. The check stubs recorded the purchase of anti-freeze, radios, climatizers, automatic transmissions and other parts and accessories. No such purchases had in fact been made. Checks in amounts identical with the check stubs were deposited in other bank accounts including Hayes' personal bank accounts. These amounts were deducted on the company income tax returns as parts and accessories expense. (R. 63, 94, 104, 105, 113, 147-153, 209-211.)

Whenever Grant E. Hayes Company sold a conditional sales automobile contract to Pacific Finance Corporation, the latter company discounted the contract price and set aside a part thereof as a repossession loss reserve to the credit of Grant E. Hayes Company. Later the unused portion of the repossession loss reserve, totalling about $14,000, was returned to Grant E. Hayes Company. The checks were deposited in the Continental Bank, one of them going in Hayes' personal account. Less than one-half of this income was reported on the company returns. (R. 67-70, 84-90, 107, 113, 216.)

On March 12, 1948, Hayes personally borrowed $20,000 from Continental Bank, putting up as security property at 648 South State Street, Salt Lake City, Utah. The terms of the loan called for payments of $300 each month. Seven $300 payments and three other payments of $500, $645, and $425 were made by Grant E. Hayes Company. The $300 payments were charged to rent. The other payments were charged to parts and accessories. These expenditures were taken as deductions on the company returns. The payments were received by Continental Bank and were credited to

Hayes' loan account. This income to Hayes was not reported on his return. (R. 70-75, 147.)

In August and September, 1950, $4,272.39 was accumulated in a delivery and handling account. This sum was withdrawn by three company checks and was deposited in one of Hayes' personal bank accounts. None of this amount was reported either in the company's original return for 1950 or in Hayes' personal return. (R. 102, 108, 109, 160, 240.)

The Continental Bank was used for the deposits of the Studebaker volume discount payments, the deposits of Pacific Finance Company checks representing the dealer reserve account, the payments on Hayes' personal obligation which were charged on the company books to rent or to parts and accessories, and payments to Ronald J. McDonald other than his salary. These transactions were segregated from routine matters which were handled through the First Security Bank. From the numbers on the checks it appears that approximately 12,000 checks went through the First Security Bank during the period of the four years involved. During the same period eighty checks were drawn on the company account in the Continental Bank. (R. 145, 151, 165, 168, 212-214.) Each month the bank statements from Continental Bank were examined personally by Hayes (R. 151, 169.) Although a firm of accountants headed by J. N. Casella, C. P. A., prepared each of the income tax returns for Hayes and the Grant E. Hayes Company (R. 82), Casella's firm was not told about the Continental Bank account nor the special income items that went into that account (R. 157, 173).

On each of Hayes' income tax returns, the only items of income listed were his regular monthly salary of $1,000 from the Grant E. Hayes Company, plus regular bonus payments to him which were listed in the

company books, and miscellaneous capital gains which are not material to this case. (R. 226). None of the items described as having been deposited in his personal bank accounts were reported in his personal tax returns. (R. 113.)

Ronald J. McDonald had no source of income other than that received from Grant E. Hayes Company. His regular salary checks drawn by the company on the First Security Bank were reported in his returns. The amounts which were paid to him out of the Continental Bank were not reflected in the company records and were not reported in his income tax returns. (R. 114, 144, 226, 227.)

During the investigation petitioners attempted to deceive the examining agents as to the deposits in and withdrawals from the Continental Bank account. (R. 133-136, 152, 179, 183.)

McDonald testified about the Continental Bank account, the items that passed through this account, and the reason for not recording these items. In substance he said that the items that went into the Continental account were the unusual items; they were large payments by Studebaker Company to Grant E. Hayes Company; they were also large payments by Pacific Finance Company to Grant E. Hayes Company; they were not the regular day to day transactions; they were not recorded on the company books, but in the Continental Bank account. (R. 145, 146.) McDonald testified that he did not record the Studebaker volume discount payments because he "had a bad balance to start with". (R. 146, 151.) The Pacific Finance Company checks were handled (R. 146) the same way and if Mr. Hayes needed money he would give them to him (R. 153, 161). In stating the reason why he charged the parts and ac-

cessories account for items in fact had not been purchased, McDonald testified (R. 148, 153) that he wanted to get his book inventory in accord with actual inventory (although he didn't take any actual inventory) and the only method he could devise to do it was to pad the parts and accessories purchases and give the amounts by checks to Hayes. He stated that he placed the various notations on the check stubs to deceive Hayes and made the checks out to Hayes in odd amounts so it would appear that tax deductions had been made. (R. 148, 152, 153.)

Grant E. Hayes testified that during the years involved his personal bank account varied (R. 175) anywhere from $15,000 to $50,000. With regard to the company checks issued to him Hayes testified that he thought such payments were bonus payments to him and he felt positive that the withholding tax had been taken out of such payments, although he never once in the four year period had any discussion with McDonald with regard to such checks and payments. (R. 170, 174, 175, 177, 182, 183.) The only conversation he could recall with McDonald with regard to such checks was that McDonald would ask him if he could use any money and he would tell McDonald that he could. (R. 175.) Although he was particularly interested in keeping close watch over the "reserves" in the Continental Bank account (R. 168, 178-179) he was not interested in the tax returns. He looked at the Continental Bank account statements every month; he said that he did not ever examine his annual income tax returns. (R. 174, 178.)

ARGUMENT

1. The fiscal year of the corporation ended on September 30, and its original 1950 return was filed on December 15. (R. 221.) The corporation was re-

quired, under the provisions of Section 305 of the Excess Profits Tax Act of 1950 (*supra*, pp. 3-4), to file an amended 1950 return before March 15, 1951, and this was ultimately filed on April 7, 1952.[1] (R. 223.) Both were introduced in evidence by the Government. (R. 62.) Petitioners argue (Pet. 2, 5-6, 9-13) that the original return should have been excluded because the Act specifically provides that it shall not be considered a "return" for any purpose under the Internal Revenue Code, and that the amended return should have been excluded because, in filing it, they were required to incriminate themselves by stating the correct 1950 income of the corporation. There is no merit in either branch of the argument.

The false original 1950 corporate return was certainly a "return" when it was filed on December 15, 1950, and the offense of wilful attempted evasion of the corporate income taxes became complete, as the Court of Appeals points out (Pet. 26), at that time. Although the original return was deprived of its character as a "return" by the subsequent enactment of the Excess Profits Tax Act of 1950 on January 3, 1951, that did not remove the criminality of the original act of filing, for Section 145(b) of the Internal Revenue Code of 1939 (*supra*, pp. 2-3) punishes, not simply the filing of false returns, but any act of wilful attempted evasion of income taxes. *United States* v. *Beacon Brass Co.*, 344 U. S. 43. That the original filing constituted such a wilful attempt is clear, and although the Excess Profits Tax Act rendered the return itself a nullity for the purpose of computation of the corporate tax, there is nothing in the

[1] The investigation which ultimately led to the bringing of these indictments had been begun a year and a half earlier, in the fall of 1950. (R. 134.)

Act to indicate that Congress intended to wipe out offenses committed prior to the date it became effective. As the Court of Appeals noted in its first opinion (227 F. 2d 540, 542), the purpose of the Act was simply to reimpose the excess profits tax, which had expired June 30, 1950, for the last six months of that year, and to require all corporations which had filed returns during that period to recompute their taxes and file new returns.

The argument that the filing of the new return constituted a violation of the privilege against self-incrimination has long since been rejected by this Court. *United States* v. *Sullivan,* 274 U. S. 259.

2. It is urged (Pet. 2, 6, 13-16) that the allegations of the indictment did not constitute a violation of the felony provision (Section 145 (b), supra, pp. 2-3), but at most amounted to a charge under the misdemeanor statute (Section 3616(a), *supra,* p. 3). Since petitioners admit (Pet. 6, 14) that they did not specifically raise this issue in the trial court,[2] we submit that they have no standing to raise it here. This Court refused to pass on the question in *Berra* v. *United States,* 351 U. S. 131, because it had not been properly raised in the trial court by an attack upon either the indictment or the sentence. And this Court has denied the writ in other cases in which the issue had not been properly preserved. *United States* v. *Doyle,* 234 F. 2d 788 (C.A. 7), certiorari denied, 352 U.S. 893; *United States* v. *Achilli,* 234 F. 2d 797 (C.A. 7), certiorari denied, 352 U.S. 916; *United States* v. *Moran,* 236 F. 2d 361 (C.A. 2), certiorari denied, 352 U.S. 909.

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[2] The motions for acquittal (R. 137-140, 197-198) obviously did not raise the issue.

3. There is no merit in the contention (Pet. 2, 6-8, 16-18) that the trial judge exhibited such bias and prejudice against petitioners as to deprive them of due process of law. Of course the mere fact that the judge imposed heavier sentences after the second trial than after the first does not indicate bias. Petitioners do not contend that following a reversal on appeal and a retrial, the trial court should be limited to sentences initially imposed (Pet. 17). The second set of sentences were well within the allowable maximum; the Government's evidence (*supra,* pp 5-10) clearly establishes that the evasions were flagrant; and the trial judge specifically explained, in imposing sentence (R. 204-205), that, having heard the evidence a second time, he was more impressed than he had been previously by the amounts of taxes evaded and by the aggravated nature of the offense.

Examination of those portions of the record cited by petitioners (Pet. 7) discloses that the complaints about the trial judge's interruptions of counsel, and about his insistence that counsel agree on the manner in which corporate records were to be presented, are baseless. The trial judge was clearly trying to expedite matters (cf. R. 94-101) and to clear up difficult issues, and his asperity, if any, was directed more against Government counsel than against the defense. Defense counsel made no objection when the court decided to go ahead with argument to the jury on Friday afternoon (R. 185), and an examination of the charge to the jury (R. 186-196) reveals that the judge did not discuss the theory and the evidence of the prosecution, but contented himself with a general statement of the applicable principles of law.

4. Petitioners assert (Pet. 3, 8-9, 18-19) that new evidence was produced at the second trial which demonstrated their innocence and which the Court of Appeals failed to review. But the petition certainly does not demonstrate this, for the alleged new evidence does not appear therein. We submit that the evidence adduced by the prosecution and summarized above (pp. 5-10) amply supports the verdicts of guilty.

5. Nor is there merit in the final contention (Pet. 3, 9, 19-22) that the trial court should have given petitioners' requested instruction (R. 44) to the effect that the Government's circumstantial evidence must be such as to exclude every reasonable hypothesis other than that of guilt. The court properly charged the jury on the requirement of proof beyond a reasonable doubt (R. 195-196), and, as this Court held in *Holland* v. *United States,* 348 U. S. 121, 139-140, no more is required.

CONCLUSION

The decision of the court below is clearly correct, and no question calling for review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1957.

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